

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROY J. LeFEVRE and ROSALIND T.
LeFEVRE, husband and wife; and
LAURIE J. V. OLSON, PERSONAL
REPRESENTATIVE OF THE ESTATE OF
JAMES OLSON, AND INDIVIDUALLY AS
THE SURVIVING SPOUSE OF JAMES
OLSON,

Plaintiffs,

v.

CBS CORPORATION; et al.,

Defendants.

NO. 3:13-cv-05058-RBL

DEFENDANT CROWN CORK & SEAL
COMPANY, INC.'S MOTION FOR
RECONSIDERATION ON ITS MOTION
FOR SUMMARY JUDGMENT AS TO
LAURIE J.V. OLSON'S CLAIMS

NOTE ON MOTION CALENDAR:
DECEMBER 10, 2013

Defendant Crown Cork & Seal Company, Inc. ("Crown Cork") respectfully requests that the Court reconsider its decision denying summary judgment in its favor because the Court erred in ruling that Plaintiff Olson created a genuine issue of material fact on the issue of causation. Plaintiff's medical causation expert Samuel Hammar, M.D., did not address Crown Cork in his initial report, specifically excluded Crown Cork in his declaration, and Plaintiff's counsel specifically advised that the supplemental causation reports do not apply to Crown Cork. Likewise, Plaintiff's medical causation expert did not address the type of exposure – take-home/household – at issue against Crown Cork in the Olson case. The record contains a dearth of evidence that James Olson was exposed to respirable asbestos fibers in his

1 household from products for which Crown Cork¹ would be responsible. Under these
 2 circumstances, Plaintiff Olson cannot establish that asbestos fibers from a Mundet Cork product
 3 was a substantial factor in causing the injuries for which she seeks relief. In the absence of
 4 such proof, summary judgment is appropriate and the Court should reconsider its ruling
 5 denying summary judgment.

6 **II. FACTS**

7 In the interests of brevity, Crown Cork incorporates the statement of facts set forth in its
 8 motion for summary judgment as though fully set forth herein.

9 **III. ISSUES PRESENTED**

10 1. Should the Court reconsider its denial of summary judgment as to Crown Cork
 11 when Plaintiff Olson has presented no admissible evidence supporting the conclusion that
 12 James Olson was exposed to respirable asbestos fibers in his house from a product
 13 manufactured, sold or distributed by Mundet Cork, or that any household exposure James
 14 Olson may have had to a Mundet Cork asbestos-containing product was a substantial factor in
 15 causing James Olson's alleged disease?

16 **IV. EVIDENCE RELIED UPON**

17 This motion is based upon the pleadings and documents on file with the Court.

18 **V. ARGUMENT**

19 A party may seek reconsideration of a ruling on a summary judgment motion pursuant
 20 to Federal Rules of Civil Procedure 59(e) (motion to alter or amend a judgment) or 60(b)
 21 (relief from a final judgment, order, or proceeding) and Western District of Washington Local
 22 Rule 7(h). "Reconsideration is appropriate if the district court . . . committed clear error or
 23 the initial decision was manifestly unjust."² Respectfully, reconsideration of the Court's
 24 Order denying summary judgment in Crown Cork's favor is necessary in this case because the
 25 Court committed "clear error" and its initial decision was manifestly unjust insofar.

26 ¹ Plaintiff Olson's claims against Crown Cork result only from Mr. Olson's alleged exposure to Mundet Cork
 27 products.

² *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

1 Crown Cork submits that the Court erred in its application of the 2011 Washington
 2 decision *Morgan*³, and the broader causation framework set forth in *Lockwood*⁴ and its
 3 progeny. Pursuant to the same, Plaintiff bears the burden of coming forward with sufficient
 4 admissible evidence to show that a Mundet Cork product's usage in proximity to James
 5 Olson's father supports a reasonable inference that the product was then carried home on his
 6 father's clothing and that thereafter James Olson's exposure to such product was a substantial
 7 factor in causing the asbestos-related disease.⁵ Specifically, Plaintiff must demonstrate that
 8 Mr. Olson's father, a marine electrician, worked with or around a Mundet Cork asbestos-
 9 containing product that released asbestos fibers that adhered to his clothing and then brought
 10 such respirable asbestos fibers home to James Olson with sufficient frequency, regularity, and
 11 proximity exposure to cause the alleged illness.⁶

12 *Lockwood* requires proof of **medical causation**.⁷ But Plaintiff failed to offer any
 13 medical causation testimony against Crown Cork. To the contrary, Plaintiff's medical
 14 causation expert has not and cannot provide any causal connection between James Olson's
 15 alleged household exposure to Mundet Cork products and his disease. Plaintiff's medical
 16 causation expert offers no opinions regarding James Olson's household exposure to Mundet
 17 Cork products, nor does he establish a causal connection between any Mundet Cork product
 18 and James Olson's disease.⁸ The absence of medical causation testimony alone warrants
 19 reconsideration of the Court's denial of summary judgment.

20 Additionally, Crown Cork believes that the Court erred when it accepted the Plaintiff's
 21 interpretation of *Morgan* in determining whether Plaintiff Olson had set forth sufficient
 22 admissible medical causation evidence to defeat summary judgment. In her briefing in
 23 opposition to Crown Cork's motion for summary judgment, Plaintiff asserts that *Morgan*

24 ³ *Morgan v. Aurora Pump Co.*, 159 Wash. App. 724, 727, 248 P.3d 1052, 1055 review denied, 172 Wash. 2d
 25 1015, 262 P.3d 63 (2011).

⁴ *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987).

⁵ *Id.*, at 248.

⁶ *Lockwood*, 109 Wn.2d at 248.

⁷ *Id.*, at 248-49.

⁸ See, e.g., Federal Report of Samuel P. Hammar, M.D., Dkt. No. 156.

1 allows a plaintiff to overcome summary judgment in the absence of product-specific
 2 testimony with evidence that asbestos exposure caused a claimant's mesothelioma.⁹ Plaintiff
 3 states that she is "not required to present specific causation evidence, i.e., expert opinion that
 4 asbestos from [Mundet] was a 'substantial contributing factor' in causing the disease."¹⁰ Not
 5 so. Plaintiff grossly misinterpreted the *Morgan* decision to the Court's (and Crown Cork's)
 6 detriment. If the Court is to accept Plaintiff's interpretation of *Morgan*, Washington will be a
 7 *de facto* absolute liability state – under those circumstances, liability would attach every time
 8 a claimant can prove that an asbestos-containing product was merely present anywhere at the
 9 300 acres of PSNS. Washington law requires more than that.

10 While an asbestos plaintiff may establish exposure through circumstantial evidence,
 11 the evidence supporting exposure must have sufficient indicia of reliability.¹¹ Certainly,
 12 Washington law requires Plaintiff to place Mundet Cork asbestos-containing products in the
 13 vicinity of Mr. Olson's father at PSNS and that such product was carried home and thereafter
 14 James Olson was exposed to such products. In *Morgan*, the Court found that the use of
 15 circumstantial evidence of exposure was sufficient to defeat summary judgment where the
 16 plaintiff submitted deposition testimony of coworkers and expert witnesses regarding PSNS -
 17 the one site at issue. One of the coworkers was, like the plaintiff, a pipefitter at PSNS, where
 18 he worked with the plaintiff aboard three aircraft carriers.¹² That coworker further testified
 19 extensively about the work he personally observed the plaintiff performing at PSNS, including
 20 work near defendants' products.¹³ The *Morgan* plaintiff also offered the testimony of a
 21 superintendent at PSNS, who testified that "almost all" of the equipment at issue in the case
 22 that was used at PSNS contained asbestos, and linked that equipment to the original
 23 manufacturer defendants.¹⁴

24 ⁹ Plaintiffs' Omnibus Response in Opposition to Motions for Summary Judgment, 27:13-20.

25 ¹⁰ *Id.*

26 ¹¹ *Morgan, supra.*, 159 Wash. App. 724; *Allen v. Asbestos Corp., Ltd.*, 138 Wash.App. 564, 571, 157 P.3d 406 (2007).

27 ¹² *Morgan*, at 731.

¹³ *Id.*, at 732.

¹⁴ *Id.*, at 733.

1 Similarly, the *Morgan* plaintiff offered expert testimony confirming that direct PSNS
 2 exposures were the only causative factor in the subject mesothelioma.¹⁵ When the only
 3 evidence of exposure to asbestos-containing products was at PSNS, plaintiff's expert was able
 4 to provide a medical causal connection between Mr. Morgan's work at PSNS and his
 5 mesothelioma.¹⁶ Under those circumstances, the *Morgan* court found that the plaintiff raised a
 6 genuine issue of material fact that he was exposed to asbestos contained in products that were
 7 made, sold, or supplied to PSNS by each of the defendants and that such exposure was a
 8 substantial factor in causing his mesothelioma.¹⁷

9 The facts presented here are vastly different than those presented in *Morgan*. The
 10 differences create the basis for Crown Cork's request for reconsideration. First, there is a
 11 marked paucity of testimony from James Olson's father's PSNS coworkers. The Court has
 12 not heard any evidence placing Mr. Olson's father in the vicinity of a Mundet Cork asbestos-
 13 containing product. Unlike in *Morgan*, where the plaintiff put forth evidence of specific job
 14 functions that the plaintiff performed in discrete areas, Plaintiff has only presented generalized
 15 descriptions of marine electricians' job functions at PSNS while Mr. Olson's father was
 16 employed there. In this case, the speculative nature of the evidence of Mr. Olson's father's
 17 alleged exposures is markedly different than the unambiguous testimony of Mr. Morgan's
 18 direct coworkers.

19 Moreover, the expert testimony in this case differs from that presented in *Morgan*. It
 20 bears repeating that the only exposures which allegedly involve Mundet Cork are "take-
 21 home" exposures via Mr. Olson's father. Therefore, there are two distinct types of exposure
 22 which could have contributed to Mr. Olson's disease: take-home, and directly while Mr.
 23 Olson himself served in the U.S. Navy and then worked as a sandblaster and painter at PSNS.
 24 The only scientific causation evidence in the record – from Crown Cork's expert Dr. Dennis
 25 Paustenbach – establishes that the take-home exposure did not increase the risk of James

26 ¹⁵ *Id.*, at 734.

27 ¹⁶ *Id.*

¹⁷ *Id.*, at 735.

1 Olson's disease. Certainly, Plaintiff's medical causation evidence, which only addresses
2 James Olson's direct exposures and does not address the alleged Crown Cork take-home
3 exposure, does not rise to the level of *Morgan*. The absence of such causation evidence is
4 fatal to Plaintiff's claim and warrants reconsideration of the Court's denial of summary
5 judgment as to Crown Cork.

6 VI. CONCLUSION

7 For the reasons given above, the Crown Cork respectfully requests that the Court
8 reconsider its Order denying summary judgment and dismiss all of Plaintiff Olson's claims
9 currently pending against it.

10 DATED this 10th day of December, 2013

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
CERTIFICATE OF SERVICE

I, Helen Van Buren, hereby make the following Declaration from personal knowledge:

On December 10, 2013, I presented the attached document to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys:

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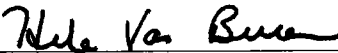
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I HEREBY DECLARE UNDER PENALTY OF PERJURY under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

EXECUTED this 10th day of December, 2013, at Seattle, Washington.


 Helen Van Buren